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No. 84-312

IN THE

Supreme Court of the United States

October Term, 1984

DONALD J. DEVINE, Director,
OFFICE OF PERSONNEL MANAGEMENT,
Petitioner

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

~~MOTION FOR LEAVE TO FILE AND~~ BRIEF OF THE UNITED BLACK FUND OF AMERICA, AMERICAN CANCER SOCIETY (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County, and Northern Virginia Area Office), AMERICAN RED CROSS (District of Columbia Chapter), BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY, BOY SCOUTS OF AMERICA (National Capital Area Council), LUTHERAN SOCIAL SERVICE OF THE NATIONAL CAPITAL AREA, SALVATION ARMY (National Capital Area), VISITING NURSE ASSOCIATION OF NORTHERN VIRGINIA, CENTER CITY COMMUNITY CORPORATION and the UNITED BLACK FUND OF GREATER WASHINGTON AS *AMICI CURIAE* ~~IN SUPPORT OF REVERSAL~~

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The above-named charitable and philanthropic organizations move for leave to file a brief *amici curiae* urging reversal of the decision below which held Exec. Order No. 12,404 constitutionally invalid. *Amici* believed the court below erred and its decision should be reversed by this Court.

If allowed to stand, the decision below will impede these organizations and other similar charitable organizations in attaining their goals of providing human health and welfare services directly to individuals and their families. These organizations support the government's efforts to have the Combined Federal Campaign returned to its original purpose of supporting direct health and welfare services. Because of their unique perspective and the particular effect the decision below has on them, they seek to file the accompanying brief *amici curiae* in order to bring before the Court certain considerations which they believe will be important to the Court in deciding this case.

All of the above-named organizations, as more fully set out in the Appendix to the accompanying brief, are traditional eleemosynary organizations dedicated to providing direct health or welfare service. All are long-time participants in the Combined Federal Campaign. Since the decision below will serve only to diminish the effectiveness of the entire Campaign with the result that *amici*, their program beneficiaries, and ultimately society as a whole will suffer, and because *amici* believe the Court below erred in its decision invalidating Exec. Order No. 12,404, these organizations urge this Court to grant their motion and consider their views.

Respectfully submitted,

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QUESTION PRESENTED

Whether Executive Order No. 12,404, which preserves the Combined Federal Campaign for its intended purpose of supporting traditional human health and welfare charity and thus excludes legal advocacy and certain other groups, violates the First Amendment.

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The United Black Fund of America, American Cancer Society (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County, and Northern Virginia Area Office), American Red Cross (District of Columbia Chapter), Boys and Girls Homes of Montgomery County, Boy Scouts of America (National Capital Area Council), Lutheran Social Services of the National

Capital Area, Salvation Army (National Capital Area), Visiting Nurse Association of Northern Virginia, Center City Community Corporation and the United Black Fund of Greater Washington submit this brief *amici curiae* in support of the petitioner and urging reversal of the decision below. *Amici* submit that the court below both failed to apply the proper analysis to resolve the straightforward issue presented and misapplied the analysis it chose to use. For these reasons, *amici* submit that the court below erred as a matter of law in invalidating Executive Order No. 12,404 on constitutional grounds.

I. INTEREST OF AMICI

Amici represent a cross-section of humanitarian charitable organizations dedicated to providing health and welfare services directly to individuals and their families. They include national organizations, community chapters and divisions of national organizations, and strictly local organizations, and they provide human health and welfare services in a variety of areas, including cancer research and patient services, disaster relief, in-home and day care for the elderly and infirm, youth development activities and food, shelter, and basic life necessities for the homeless.[1] While the precise focus of each *amicus* organization differs, they are nonpolitical, nonpartisan organizations dedicated to humanitarian service. Their purposes are recognized by citizens as community-wide concerns and there is a general consensus among federal employees and

[1] A description of each organization joining in this brief is submitted in the Appendix to this brief. While each *amicus* organization provides services in the Washington, D.C. metropolitan area, and some do so exclusively, these organizations have counterparts in communities nationwide.

citizens that these organizations provide a necessary service and are deserving of their support.

In addition to being charitable organizations with the time-honored purpose of providing human health and welfare services and thus fostering the well-being of the entire community, each *amicus* organization is a long-time participant in the Combined Federal Campaign ("Campaign"). These organizations, and particularly local organizations such as the United Black Fund and the Center City Community Corporation, obtain a substantial portion of their funding through the Campaign. *Amici* depend on the strength, viability and general acceptance of the Campaign among contributors. The issues raised in this case will in large measure determine the future of the Campaign. *Amici,* therefore, have a vital interest in the outcome of the case.

II. STATEMENT

The Combined Federal Campaign is the federal government's program for conducting an annual fund-raising effort among its employees and military personnel for the support of national and local health and welfare organizations. Over three million persons are reached by the Campaign each year in the United States and abroad. Campaigns are conducted in each local community where federal employees and military personnel work and each Campaign is directed and coordinated by federal employees.

Under the circumstances when this case arose, participating national charities were required to meet certain eligibility criteria set out in Exec. Order No. 12,404 and the regulations promulgated thereunder. Local charities were required also to meet similar requirements for

eligibility in those local communities where they provide service. In either case, a committee composed of federal employees reviewed the applications of charitable organizations for inclusion in the Campaign.

Exec. Order No. 12,404 set out certain principles to guide the Director of the Office of Personnel Management in establishing eligibility criteria. As set out, the objectives of the Campaign included lessening the burdens of government and of local communities in meeting needs of human health and welfare and avoiding the reality and appearance of the use of federal resources to assist fundraising for "political activity or advocacy of public policy, lobbying, or philanthropy of any kind that does not directly serve needs of human health and welfare." 3 C.F.R. 151 § 2(b) (1984). To carry out these objectives, the Order provided that the Campaign shall be limited to organizations providing or supporting direct health and welfare service to individuals or their families and that the services provided must directly benefit human beings, whether children, youth, adults, the aged, the ill and infirm, or the mentally and physically handicapped. Further, the Order specifically excluded those groups from participation in the Campaign which sought to influence public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves.

This case arose because certain charitable organizations which alleged they would have been excluded by the provisions of Exec. Order No. 12,404 have sought and obtained injunctive relief declaring the Order constitutionally invalid. The government seeks reversal of the decision below and *amici* join fully with the government in this effort.

III. ARGUMENT

Introduction and Summary

Since its inception the Campaign has served as highly effective means of harnessing the generosity of federal employees for the benefit of health and welfare charities. Support for the Campaign has been widespread because of the federal employees' confidence in the fact that their contributions were being used to fund traditional health and welfare agencies that operated without regard to politics or ideology.

The decision of the court below radically altered the character of the Campaign by mandating the inclusion of wholly different kinds of organizations, such as right-to-work and other legal advocacy groups. These organizations do not have the general acceptance by the employees that has been accorded in the past to the Campaign's traditional participants. Erosion of the goodwill on which the Campaign is based has occurred and will continue to occur if the decision below is not reversed and the Campaign is not permitted to conform to its originally intended purpose and character.

As a result of the decision below, if the government wishes to continue its sponsorship of the Campaign, it must permit participation by a vast array of organizations whose only common characteristic is their tax-exempt status. Contrary to its original intent, the Campaign can no longer require that the participants be devoted to providing direct health and welfare benefits to individuals and their families, thus lessening the burden of the government in meeting human health and welfare needs. More importantly, however, this is not a result that the Constitution requires. In concluding otherwise, the court below plainly erred.

It must be stressed as an initial matter that the government has not deprived respondents and similar organizations access to federal employees for the purpose of communicating their appeals for support. Indeed, by regulation, organizations that either choose not to participate in the Campaign or are deemed ineligible for participation may nonetheless directly appeal in the workplace to federal employees for contributions to their respective organizations. Thus, what is at issue here is not the denial of access to federal employees, but the far narrower question of whether the government may prescribe the kinds of organizations which may participate in its program for support of health and welfare charity.

The court below chose to resolve this eligibility issue through a First Amendment "forum" analysis. We explain below that if this were the appropriate analytic framework, the court still erred because it misapplied the principles and standards this Court has established for forum cases. More fundamentally, however, we point out that forum analysis is inappropriate and that the issues here are more properly addressed under equal protection principles.

Forum analysis is premised on the assumption that speech has been curtailed or limited in some fashion at a particular facility or place. This is not the case here, however. There is no particularized situs for the Campaign and, as we point out, the Campaign itself cannot be the "forum."

Thus, in the true sense there is no forum involved here. Rather, the federal government has merely established a program to raise funds among its employees for charitable purposes. Federal employees on official time, and at diverse places throughout the country, are organized dur-

ing a campaign period to receive and distribute Campaign materials, to encourage contributions from other civilian and military personnel on behalf of the participating organizations, to make payroll deductions, and to take other actions in support of the fund-raising effort. These and related forms of assistance and aid are tantamount to federal subsidies, and it is as a subsidized program that the constitutionality of the Exec. Order No. 12,404 must be considered.

In this connection, it is well-established that governmental programs and subsidies are constitutional if the distinctions they draw are rationally based. *Dandridge v. Williams,* 397 U.S. 471 (1970). Moreover, while such programs are also constrained by the First Amendment in the sense that they may not be intended to discourage the expression of particular ideas, *see Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983), there is no such intent or effect here. The limitations on participation in the Campaign are viewpoint neutral: ideology, politics and like factors play no role in the eligibility process.

The effect of the decision below is to dictate that the government must yield all discretion with respect to the kinds of organizations which may participate in the Campaign, or have no Campaign at all. Axiomatically, however, the Constitution "does not require that [the government] must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. at 486-487. We point out below that the classifications made by Exec. Order No. 12,404 serve legitimate governmental interests and are, therefore, rational. Since the Executive Order is even-handed and viewpoint neutral, the rationality of the classifications establishes its constitutionality.

Should the Court nonetheless determine that the issues here must be resolved under First Amendment public forum principles, we show below that the Court of Appeals still erred. First, while the court assumed, without deciding, that the forum here was nonpublic, we show that this is in fact the case. To conclude that the forum is other than a nonpublic one would be to augur the destruction of the Campaign, for as it currently exists the Campaign includes a number of limitations on what expression participating organizations can and cannot make. These limitations could only stand with the appropriate deference which is accorded in nonpublic forums. For example, there are precise limitations on the number of words that can be used by an organization to describe itself in Campaign literature and an absolute requirement that each organization's narrative description be reviewed and approved prior to its publication.[2]

While these and like restrictions are necessary to the conduct of an orderly Campaign, and they are not at issue here, if the Campaign were deemed a public or limited public forum, these restrictions could not survive constitutional challenge. Invalidation of these restrictions would set the clock back over twenty years to the time before President Kennedy issued Exec. Order No. 10,927 to bring order out of the prevailing chaos of organization upon organization making whatever kinds of appeals they chose whenever they wished to do so. Certainly, the government, just as a private employer, must have the ability to run a

[2]Current regulations do not impose these limitations, for they do not provide for any descriptions to be published. *See* 5 C.F.R. § 950.521(e)(2)(i) (1984), 49 Fed. Reg. 32735, 32751 (1984). The relevance of these limitations here is that they have historically existed and, given the Director's expressed intent to keep the Campaign intact in the event Exec. Order No. 12,404 is vindicated, *see* 49 Fed. Reg. at 32735, they presumably would be reinstated in such event.

controlled and orderly program of charitable solicitation among its employees.

After showing that at most the forum here is a nonpublic one, we then demonstrate that the Court of Appeals erred in assuming that the standard for judging limitations on activities in a nonpublic forum was more onerous than the requirement that rational basis be present. Indeed, as we point out, ultimately the standard by which the Executive Order must be judged under a forum analysis is the same rational basis standard that obtains in the equal protection context. And, for the same reasons supporting the conclusion that there is a rational basis for the classifications drawn by the Executive Order under equal protection principles, there is also a rational basis for forum analysis purposes.

A. The Eligibility Criteria Of Executive Order No. 12,404 Survive Constitutional Scrutiny Under Equal Protection Analysis

1. The court below erred in focusing on the "public forum doctrine" to resolve the issue in this case

Resolution of the question presented in this case, whether certain legal defense funds have a constitutional right to participate in the Combined Federal Campaign, is more straightforward than suggested by the opinions below. Simply, this case calls for the application of settled principles of equal protection analysis, *i.e.*, whether the distinctions drawn by Executive Order No. 12,404 are rationally based. *Dandridge v. Williams*, 397 U.S. 471 (1970). The courts below eschewed this approach to the issues and instead relied on the "public forum doctrine" to resolve this case. "Forum" analysis, however, adds an un-

necessary complication to the question raised here and, in any event, on close inspection is inapposite.

Forum analysis, of course, is premised on the assumption that the government has proscribed speech, and it begins with examination of the nature of the affected speech and the facility where the disputed speech is putatively prohibited. *Perry Education Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44 (1983); *U.S. Southwest Africa/Namibia Trade and Cultural Council v. United States,* 708 F.2d 760, 766 (D.C. Cir. 1983). This Court has utilized forum analysis to test limitations on speech in facilities spanning virtually the entire spectrum of communicative forums, from state prisons to public streets and sidewalks. *See, Jones v. North Carolina Prisoners' Union, Inc.,* 433 U.S. 11 (1977); *Carey v. Brown,* 447 U.S. 455 (1980). By analyzing the nature of the facility and determining thereby whether it is a public forum, limited public forum or nonpublic forum, the Court has identified those communications that are constitutionally protected and those that the government may permissibly limit.

Significantly, in each "forum" case that has come before the Court, there has been a real, tangible facility involved. For example, in *Adderly v. Florida,* 385 U.S. 39 (1966), the Court was confronted with speech issues at a county jail; in *Widmar v. Vincent,* 454 U.S. 263 (1981) and *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167 (1976), in university and school board meeting places; in *United States Postal Service v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114 (1981), in mailboxes; and in *Greer v. Spock* 424 U.S. 828 (1976) in military bases. Furthermore, in none of these cases was there any dispute as to what facility constituted the forum.

In sharp contrast to these precedents, there is no identifiable forum involved in this case. The judges below were divided on whether to consider the Campaign itself as the appropriate forum, or whether the federal workplace was the forum. But, surely the Campaign itself cannot be a "forum," for unlike a mailbox, prison or military base, the Campaign is a governmental program, not a facility. Organizations do not seek physical access to the Campaign as they might a public transit bus or an airport display case or a billboard[3] to engage in "informative and perhaps persuasive speech." *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632 (1980).

Similarly, the federal workplace cannot properly be characterized as a forum. To be sure, the federal workplace, unlike the Campaign, is a concrete, real situs consisting of all the thousands of federal office buildings, lands and other loci when work is performed by federal employees. But the enormity of this "forum" and the myriad variations of its individual components render it useless as a starting point to determine the degree of scrutiny the eligibility criteria must survive. Thus, for example, the federal workplace contains military bases,

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[3] Judge Gesell observed that "by providing organizations the opportunity to participate in the [Campaign], the government has, in effect, provided a billboard . . . through which these organizations can disseminate their appeals to federal workers." *NAACP Legal Defense and Educational Fund v. Campbell,* 504 F.Supp. 1365, 1367 (D.D.C. 1981). Presumably, this observation was based on the fact that participants were given 30 words in which to describe their respective organizations. 5 C.F.R. § 950.521(e)(2)(i) (1983). In Judge Gesell's analysis, the "billboard" is the *sine qua non* of the forum. The Campaign, however, would continue to exist if participating organizations were permitted only to list their names, as is now the case (*see* 5 C.F.R. § 950.211(h) (1984)), or even if the government decided not to list the participating organizations at all. Thus, while the analogy is an easy one, it does not bear scrutiny.

prisons, university meeting rooms and public parks. Yet as this Court has made clear, no one standard governs the scope of the First Amendment's protection with respect to each of these forums. In view of this, it would be nonsensical to suggest that the Constitution would tolerate application of the eligibility criteria to exclude legal defense funds from participating in the Campaign, for example, at military bases, but not at National Park facilities.

The dissent below attempted to "analyz[e] the communicative medium in the larger context of the place in which the facility exists," *NAACP Legal Defense and Educational Fund v. Devine,* 727 F.2d 1247, 1271 (D.C. Cir. 1984) (Starr, J. dissenting), and faced with selecting either the Campaign or the federal workplace as the applicable forum, it correctly chose the latter. But a third path was available that both the majority and dissent elected not to follow: because there is no forum present in this case, analysis turns not on an examination of the nature of the forum, but rather on settled principles of equal protection. For, like an individual seeking to utilize expenses for lobbying as a tax deduction, *Cammarano v. United States,* 358 U.S. 498 (1959), or an individual seeking to use federal money to pay for an abortion, *Harris v. McRae,* 448 U.S. 297 (1980), the respondent organizations here seek merely to participate in and benefit from a governmental program. In these circumstances, equal protection analysis, and not "forum" analysis, provides the appropriate standards by which to judge the disputed governmental actions. *Regan v. Taxation With Representation of Washington,* 461 U.S. at 548-49.

As this Court observed in *Members of the City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2134 n. 32 (1984), "[g]enerally an analysis of whether property is a public forum provides a workable analytical

tool." Here, however, because this case does not fit neatly within "the paradigms of government property interests mirroring analogous private interests and those clearly held in trust, either by tradition or recent convention, for the use of the public," *id.,* the usefulness of this approach is especially limited. Indeed, application of forum analysis to the facts of this case confused the straightforward issue presented here into one that now requires this Court's clarification.

2. Equal protection analysis is the proper vehicle for resolving the issue presented in this case

As demonstrated above, attempts to classify the Campaign as a "forum" are both problematic and unenlightening. This is hardly to say, however, that the issue presented here is irresolvable, or that some novel balancing of constitutional interests is necessary. Rather, accepting the Campaign for what it is, and it is simply a federal program designed to meet certain objectives in a certain manner at a certain cost, resolution of the issue presented in this case calls for no more than application of well-established principles of equal protection.

Like many federal programs, the Campaign was implemented to accommodate and balance several competing concerns. For example, as the court below recognized, it has been the government's "long-standing policy . . . to cooperate with and assist in soliciting funds for worthy causes from Federal personnel," while at the same time it is the government's obligation to minimize disruption in its workplace to assure that its business is done. *See* 727 F.2d at 1429. Confronted with these and other competing considerations, President Kennedy in 1961 established the Campaign which, then as now, granted those who were eligible and chose to participate the unique benefits flow-

ing from the Campaign, in exchange for foregoing the opportunity to engage in direct solicitation themselves of federal employees in the workplace.[4]

Although various details of its implementation have changed, the Campaign's structure has remained largely intact since its inception. Today, as at its inception, the Campaign is a cooperative effort between charitable institutions and the federal government to facilitate the solicitation of contributions from federal employees. Military personnel and civilian employees, on official time, receive and distribute Campaign materials, and place posters urging their fellow workers to participate in the Campaign. They also arrange and conduct meetings, set contribution goals, devise methods to achieve goals and collect pledges for payroll deductions and one-time contributions and transmit payments to the PCFO. For the Washington, D.C. local Campaign, the President appoints a Cabinet Secretary or agency head to serve as Chair. Regional agency heads serve similar roles nationwide. Committees of federal employees guide each local Campaign. 5 C.F.R. § 950.509(k) (1984).

Through these efforts, the Campaign is able to raise funds at an unparallelled level of efficiency.[5] Obviously, it

[4]The Campaign is the exclusive means by which *participating* charities may solicit for contributions in the workplace. On the other hand, an organization which either elects not to participate or fails to qualify for participation in the Campaign may still seek contributions at places of federal employment "under such reasonable conditions as may be specified by the local head of the Federal installation involved." 5 C.F.R. § 950.311 (1984). Additionally, such excluded organizations are permitted to solicit at entrances or in concourses or lobbies of federal buildings normally open to the general public. 5 C.F.R. § 950.311(b) (1984).

[5]For example, in the Washington, D.C. area for the 1983-84 period, the Campaign generated contributions of over $16 million, while the amount incurred to defray the costs of the PCFO, *see* 5 C.F.R. § 950.509(e) (1984), was less than four percent.

is this efficiency which make the Campaign attractive to organizations such as the respondents here. But, there are organizations which for any number of reasons elect not to participate in the Campaign, *see* C.F.R. § 950.103(e) (1984), and there are organizations which do not meet the eligibility criteria.

Importantly, what these organizations miss by not participating in the Campaign is not the opportunity to solicit from federal workers or even the opportunity to solicit at the federal workplace. *See* 5 C.F.R. §§ 950.103(e), 950.311 (1984). Rather, what these organizations forego is the opportunity to benefit from the unique structure and heightened efficiency of the Campaign and from the fact that the government carries the bulk of the Campaign's administrative costs. Thus, "the government's assistance and efforts represent a substantial federal subsidy," *National Black United Fund v. Campbell,* 494 F.Supp. 748, 752 (D.D.C. 1980), *rev'd on other grounds,* 667 F.2d 173 (D C. Cir. 1981), and it is as a subsidized federal program that the Campaign must be viewed to assess the constitutionality of Exec. Order No. 12,404.

3. The eligibility criteria of Executive Order No. 12,404 do not offend equal protection principles

The First Amendment protects charities' fundamental right to communicate information, disseminate views and advocate their causes. *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. at 632; *Secretary of State of Maryland v. Joseph H. Munson Co.,* 104 S.Ct. 2839 (1984). But the government need not demonstrate a compelling justification every time its action affects the exercise of a First Amendment right. Rather, with respect to governmental programs and governmental subsidies,

the Constitution requires only that the government have a rational basis for its action and that its action not infringe the First Amendment by being intended to discourage the expression of particular ideas. *Regan v. Taxation With Representation,* 461 U.S. at 548; *id.,* at 551 (Blackmun, J., concurring.)[6] The eligibility criteria of Exec. Order No. 12,404 easily satisfy this standard.

It cannot seriously be doubted that the government has a rational basis for excluding certain groups from the Campaign. This is so even though these organizations are designed to serve societal needs. Indeed, that the aims of the organizations sought to be excluded may be laudable does not require that the government subsidize their operations. The government, especially when it operates in the social and welfare areas, routinely draws lines. Such classifying is both necessary and unexceptional, and, as this Court has consistently ponted out, "[a] statute is not invalid under the Constitution because it might have gone farther than it did." *Roschen v. Ward,* 279 U.S. 337, 339 (1926). There is no obligation that the government "strike at all evils at the same time," *Semer v. Oregon State Board of Dental Examiners,* 294 U.S. 608, 610 (1935), for "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 489 (1955). Simply, the Constitution "does not require that [the government] must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. at 486-87.

[6]As the Court held, "[a] decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Id.* at 549. Thus, for example, Congress can constitutionally refuse to grant a business expense tax deduction for lobbying, even though lobbying is a fundamental right protected by the First Amendment. *Cammarano v. United States,* 358 U.S. 498 (1959). *See, also, Harris v. McRae,* 448 U.S. 297 (1980) and *Maher v. Roe,* 432 U.S. 464 (1977) (Congress can refuse to subsidize the exercise of the constitutionally protected right to abortion.)

Admittedly, the Campaign does not seek to address all ills and support all charitable endeavors. With respect to legal defense and political action organizations, however, Exec. Order No. 12,404 itself provides the justifications for the exclusionary criteria. Among other things, the eligibility criteria were based on the determination that the exclusion of political and legal advocacy groups promotes the government's interest in assuring the continued success of the Campaign, as well as its interest in seeing that the maximum amount of charitable aid goes directly to the needy, thus alleviating the government's burden As has been demonstrated by recent events, the Campaign's broad base of support has been eroded by its transformation into a collection agency for unrelated tax-exempt organizations uncommitted to health and welfare charity. *See Washington Post,* September 20, 1984, at A17, col. 3 (participation in the Campaign has fallen of by more than 15 per cent in the last five years.) Additionally, the eligibility criteria were based on the government's recognized obligation to avoid the appearance and reality of political favoritism. *Cf. United States Civil Service Comm'n v. National Assn'n of Letter Carriers,* 413 U.S. 548, 564 (1973); *Lehman v. City of Shaker Heights,* 418 U.S. 298, 304 (1974).

The rationality of these reasons is unassailable. In fact, the panel majority faulted the dissent for "inexplicably" applying a rational basis test: it did not dispute that the eligibility criteria were rational, but rather it held that the criteria did not survive the putatively higher standard of "reasonableness." 727 F.2d at 1266. Yet, "the courts are

not empowered to second-guess the wisdom of [governmental] policies," *Western and Southern Life Ins. Co. v. State Board of Equalization of California,* 451 U.S. 648, 670 (1981); it is their responsibility only to inquire into the legitimacy of the policy and whether the executive reasonably could have concluded that its action would promote that policy. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 466 (1981). That the eligibility criteria of Exec. Order No. 12,404 satisfy this standard is evident.

That the eligibility criteria are viewpoint neutral is equally obvious. Exec. Order No. 12,404 seeks to exclude from participation in the Campaign *all* "[a]gencies that seek to influence the outcomes of elections or the determination of public policy through political activity or advocacy, lobbying or litigation on behalf of parties other than themselves." 3 C.F.R. 151 § 1(b) (1984). Admittedly, there is a component of speech affected by this exclusion. But as this Court has made clear, the fact that the Executive Order may affect speech does not render it constitutionally infirm. *Regan v. Taxation With Representation,* 461 U.S. at 548.

In *Taxation With Representation,* this Court held that Congress could permissibly deny the right to receive tax-deductible gifts to organizations which engaged in substantial lobbying activities, even though lobbying is a constitutionally protected right. Presumably, so too could Congress deny 26 U.S.C. § 501(c)(3) status to organizations which "seek to influence the . . . determination of public policy through . . . litigation on behalf of parties other than themselves." And, of course, if the government could deny 501(c)(3) status to these organizations, so too could it exclude them from the Campaign.

To be sure, a different question would be presented if the eligibility criteria were predicated on the viewpoints of

the organizations it seeks to exclude or if the criteria were used in an attempt to suppress these organizations' viewpoints. *See Taxation With Representation,* 461 U.S. at 551 (Blackmun, J. concurring). But plainly, the eligibility criteria are viewpoint neutral – both pro-life and pro-choice legal defense funds would be excluded, as well as right-to-work and labor legal defense funds and Democratic and Republican political action committees. Just as in *Taxation With Representation,* the criteria here do not focus on the viewpoint of the organizations. Within the general category of excluded organizations, the full range of viewpoints is represented and no one point of view is singled-out for exclusion. This the Constitution does not proscribe.

B. The Eligibility Criteria Of Executive Order No. 12,404 Are Valid Under The "Public Forum Doctrine"

Although application of "forum analysis" to this case adds an unnecessary complication, properly applied it does not alter the result. The appropriate "forum" in this case must be viewed as a "nonpublic forum," and under the standards this Court has established in such cases the eligibility criteria of Exec. Order No. 12,404 pass constitutional muster.

1. The "forum" at issue in this case must properly be characterized as a "nonpublic forum"

Were it conceded that the applicable forum in this case was the federal workplace, it would be a simple matter to demonstrate that this "forum" is at best a nonpublic forum. Even more so than the inter-school mailboxes at issue in *Perry,* the federal workplace is "[p]ublic property which is not by tradition or designation a forum for public communication." *Perry,* 460 U.S. at 46. Of course, there

may be certain portions of the federal workplace, such as LaFayette Park where Park Service employees tend to the gardens, that are public forums in the truest sense. More generally, however, the federal workplace as a whole is dedicated to carrying out the business of the sovereign, and is not designed or intended for "purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939).

It must be borne in mind that the Campaign operates throughout the government – in the National Parks no less than in the secured offices of the Pentagon. In these circumstances, therefore, the whole of the federal workplace certainly cannot be deemed to be the "forum." Indeed, precision on this score simply is not possible, since the nebulous forum in this case may fall somewhere "between the paradigms of government property interest essentially mirroring analogous private interests and those clearly held in trust . . . for the use of citizens at large." *Taxpayers for Vincent*, 104 S.Ct. at 2134 n. 32.

The existence of this uncertainty suggests the inutility of forum analysis to resolve the issue presented here. Again, this is so because, by definition, forum analysis normally requires an absolute forum as a starting point to determine the permissibility of limitations on specified speech. Nonetheless, while there is no such tangible and singular forum here, it is still possible, without reifying it, to classify the operative "forum" here.

More specifically, there are significant limitations placed on what participating organizations can and cannot do in connection with their fund-raising. For example, the messages that participating organizations communicate to federal employees are subject to stringent limitations. Not

only is the length of these messages limited to approximately thirty words, *see* 5 C.F.R. § 950.521(e)(2)(i) (1983), but the content is also regulated. Organizations cannot advocate their causes as being more worthy than other causes, nor may they use symbols which will unduly attract attention to their causes. 5 C.F.R. § 950.521(d) (1983). In fact, the only "message" they can give is a brief description of their purposes to be included in the contributor's leaflet given to federal employees. Additionally, prior to publication these messages must be edited and approved by federal officials. *See* 5 C.F.R. § 950.521(a) (1983); 727 F.2d at 1250 n. 2.

Certainly, if such limitations on speech were attempted in the context of a public or limited public forum, they would be deemed constitutionally impermissible. The limitation of thirty-word descriptions, while arguably a reasonable time, place and manner restriction, would be sustainable only if it were "narrowly tailored to serve a significant governmental interest, and [left] open ample alternative channels of communication." *Perry*, 460 U.S. at 45, *citing United States Postal Service v. Council of Greenburgh*, 453 U.S. at 132. The government's restriction on the content of these descriptions, however, could only be permissible if it were necessary to serve a compelling state interest and if it were narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. at 461. And, of course, the requirement that all communications be submitted to the government for its final approval would run afoul of the Constitution as "it is the chief purpose of the [First Amendment] to prevent previous restraints upon publication." *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931).

That these and similar limitations have existed unchallenged for over twenty years is compelling evidence

that whatever forum the Campaign has created is nonpublic in nature.[7] Beyond this the government's interest in running a controlled charitable solicitation program in its workplace is the same as that of the private employer. As the Court noted in *Taxpayers for Vincent,* 104 S.Ct. at 2134 n. 31, "[a]t some point, the government's relationship to things under its dominion and control is virtually identical to a private owner's property interest in the same kinds of things." At this point, the government "has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Id., quoting Adderly v. Florida,* 385 U.S. at 47. *Cf. McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645, 646 n. 6 (1976); *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968). The unchallenged existence of content regulations and prior restraints in the Campaign's structure suggests that the use for which this "forum" was lawfully dedicated was not to foster communication of ideas, but to further the government's policy of encouraging its employees to support charitable endeavors while concomitantly preserving order in the federal workplace for the efficient transaction of its business. Because the purpose of the Campaign was accordingly not to provide a public forum, whatever

[7]To say that these limitations exist is not, of course, to say that they are constitutional. But limited public forums are creatures of governmental designation and use. *Perry,* 460 U.S. at 145, 46 & n. 7. The fact that these limitations have existed unchallenged for twenty years suggests that the government has not taken the steps necesary to transform government property into some form of limited public forum. *See, United States Postal Service v. Council of Greenburgh,* 453 U.S. at 129. Furthermore, if these limitations are unconstitutional, the Campaign would be transformed, despite its designated parameters, into the uncontrolled charity bazaar which it was created to replace. It would be anomalous indeed to suggest that the Constitution requires that the government have an uncontrollable charitable solicitation program, or none at all.

the precise forum may be in this case, it must be nonpublic in character. *Cf., Greer v. Spock* 424 U.S. at 838.

2. The eligibility criteria of Executive Order No. 12,404 are permissible in the context of a nonpublic forum

In a nonpublic forum, in addition to time, place, and manner regulations, the government may impose additional limitations "as long as the regulation of speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry,* 460 U.S. at 46, *citing United States Postal Service v. Greenburgh Civic Ass'n,* 453 U.S. at 131 n. 7. As the Court held in *Jones v. North Carolina Prisoners' Union,* 433 U.S. at 136, the government "need only demonstrate a rational basis for the distinctions between organizational groups."

As is discussed in detail above, there is a rational basis for the distinctions drawn by Exec. Order No. 12,404. And, significantly, the court below did not find otherwise. Rather, the panel majority invalidated Exec. Order No. 12,404 on the basis of its determination that a more stringent standard than rationality had to be met, a test that the court described as one of "reasonableness." Reasonableness in the context of nonpublic forums, however, is merely a different verbal formulation of the rational basis standard. The court below erred in holding that more than a rational basis had to be shown and thus arrogating to itself the substantive determination of the program's contours.

The function of a reviewing court in testing the reasonableness or rationality of an executive action is not to substitute its judgment for that of the executive.

Western and Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. at 670. Rather it is the court's role to ascertain whether the facts on which the classification were based could reasonably be conceived to be true by the governmental decisionmaker. *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78-79 (1911). Here, the government's stated rationale for the eligibility criteria included minimization of its burden to care for the needy and infirm, avoidance of the appearance of political favoritism and minimization of disruption in the workplace. It may be argued whether these ends will be served by the eligibility criteria, just as it may be argued that there may be better means of achieving these goals. But "it is the very admission that the facts are arguable that immunizes from constitutional attack the [executive] judgment." *Vance v. Bradley,* 440 U.S. 93, 112 (1979).

In this light, it is apparent that the eligibility criteria pass the constitutional tests of "reasonableness," *Perry,* 460 U.S. at 46, and "rationality," *Jones v. North Carolina Prisoners Union,* 433 U.S. at 136, and that therefore the court below erred in holding Exec. Order No. 12,404 constitutionally invalid.[8]

[8]In addition to being reasonable and rational, the eligibility criteria must as well be viewpoint neutral. For the reasons discussed in detail *supra,* there is no hint of viewpoint discrimination to be found in Exec. Order No. 12,404.

III. CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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APPENDIX

THE UNITED BLACK FUND OF AMERICA

The United Black Fund of America was incorporated in 1977 to develop and monitor black-oriented fund-raising organizations throughout the nation. It currently has 27 chapters and affiliates within 20 states across the nation which serve the human health and welfare needs of the various communities in which they are located.

AMERICAN CANCER SOCIETY
(District of Columbia Division,
Chesapeake-Potomac Area,
Montgomery County Unit,
Northern Virginia Area Office)

The American Cancer Society is a voluntary organization dedicated to controlling and eradicating cancer. It provides practical help, emotional support and community health services to persons afflicted with cancer and their families. The American Cancer Society also initiates and supports lifesaving programs of research, education, service and rehabilitation. The local chapters involved here all provide services in the Washington, D.C. metropolitan area.

AMERICAN RED CROSS
(District of Columbia Chapter)

The American Red Cross, incorporated in 1917, is an emergency-oriented organization which is chartered by Congress. The District of Columbia Chapter delivers services to the metropolitan Washington, D.C. community such as providing trained volunteers who assist families to

cope with emergencies such as flood, home fires, near-drownings and other disasters. In addition, the Red Cross provides casework services to members of our armed forces, veterans and their families, and fosters opportunities for youth leadership development. It also trains volunteers to assist in hospitals and nursing homes, to teach parents to care for newborn babies, to train first-aiders in lifesaving techniques, and to transport the indigent and elderly to clinics and hospitals and help them obtain other assistance they require. In addition, the District of Columbia Chapter of the American Red Cross operates a volunteer blood program which supplies approximately 85% of all blood used in the National Captial area.

BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY

Incorporated in 1964, the Boys and Girls Homes of Montgomery County provides residential, group and sheltered care to children ages 11-18 who are neglected, in need of supervision and assistance, or delinquents placed in its care by the Juvenile Court. This organization has established programs for basic child care, education, family therapy, counseling, special education and recreation. Also, the Boys and Girls Homes of Montgomery County provides medical referral services, and accepts self-referrals to its program for runaway youth.

BOYS SCOUTS OF AMERICA
(National Capital Area Council)

Since 1927 the Boy Scouts of America has reached boys in the National Capital Area through organized "Cub Packs" for boys age 8-10, "Troops" for those in ages

11-16, and a "Co-Ed Explorer Career Interest Program" for youth aged 14-18. The National Capital Area Council of the Boy Scouts of America operates Goshen Scout Camp in Goshen, Virginia, and trains local leaders to direct community scouting programs. The Council has special programs devoted to providing character development for youth in the metropolitan Washington, D.C. area.

LUTHERAN SOCIAL SERVICES OF THE NATIONAL CAPITAL AREA

Established in 1927, Lutheran Social Services of the National Capital Area provides adoption programs, foster care, emergency and juvenile delinquency and life-enrichment services, pastoral care, refugee resettlement and volunteer services for criminal offenders and ex-offenders. This group offers housing rehabilitation and counseling programs, a ministry to the aging and the homeless, and pre-trial sponsorship of persons accused of crimes.

THE SALVATION ARMY
(National Capital Area)

Incorporated in 1899, the Salvation Army provides emergency shelter, financial assistance and supplementary aid, food and clothing, as well as counseling, referral services, and Christmas food and toys to needy persons in the National Capital area. Its Corps Community Centers provide family-life counseling, character-building and athletic programs for youth, senior citizen programs, day care facilities and camping. The organization also offers a center for alcoholic rehabilitation, and provides job counseling, prison ministries and disaster relief.

VISITING NURSE ASSOCIATION OF NORTHERN VIRGINIA

Since 1939, the Visiting Nurse Association of Northern Virginia has provided intermittent home health services, including skilled nursing and home health aide care to the residents of northern Virginia. It offers physical, occupational and speech therapy, and provides the services of pediatric nurse practitioners, medical social workers, enterostomial therapists and oncology nursing specialists. Visiting nurses also provide home I.V. therapy and home care for the terminally ill.

CENTER CITY COMMUNITY CORPORATION

The Center City Community Corporation assists low-income inner city resident by offering tutorial, senior citizen and youth services. Incorporated in 1969, this organization provides computer literacy classes for all age groups, and operates a comprehensive housing counseling center aimed at assisting renters and homeowners in avoiding or overcoming housing problems.

THE UNITED BLACK FUND OF GREATER WASHINGTON, D.C.

The United Black Fund of Greater Washington, D.C. was created in 1969 to address the need for a balanced and unified fund-raising effort on behalf of community-based, non-profit organizations serving the social and economic needs of citizens in the Greater Washington area. The Fund's member agencies, ranging from the Geriatric Day Care Center to the Howard University Sickle Cell Research Center, have as their primary purpose the meeting of community health and welfare needs.